

# EXHIBIT B

# TRADEMARK and DECEPTIVE ADVERTISING SURVEYS

SECOND EDITION

**Law, Science, and Design**

**Shari Seidman Diamond**  
and **Jerre B. Swann**  
Editors



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Intellectual Property  
Law Section



TRADEMARK and DECEPTIVE  
ADVERTISING SURVEYS, Second Edition

Shari Seidman Diamond  
Jerre B. Swann, Editor

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of autobiographical memory, in which recalling one event is likely to facilitate recall of the next, more recent, event in memory.<sup>59</sup>

Third, it is useful to remember that human beings are motivated to express opinions that are consistent over time. Whether by accident or design, surveys can fall afoul of this consistency bias by nudging respondents to give responses they may not otherwise give, just to avoid contradicting prior answers they provided.<sup>60</sup> Finally, even seemingly cosmetic elements of a survey, such as the colors used, can prime later answers (e.g., particular shades of blue might prompt people to think of UNC-Chapel Hill in the context of universities or Tiffany & Co. in the context of jewelry).<sup>61</sup> Thus, unless certain colors, visuals, or context are necessary to replicate market conditions, any extraneous details or information should be generally be removed in favor of a minimalist approach.

## BIASES ORIGINATING WITHIN A SPECIFIC SURVEY QUESTION

This final section reviews key types of bias that can emerge within a specific survey question itself. The four primary factors in this category are (a) ambiguous questions, (b) leading questions, (c) double-barreled questions, and (d) response format biases.

### Ambiguous Questions

Poorly constructed questions (i.e., ones that are vague or excessively complex or that have multiple interpretations) do not necessarily introduce systematic bias into a survey but add harmful “noise” or random error into the data. This, in turn, can compromise a survey’s reliability and validity because it becomes difficult to know whether the results reflect a true signal (e.g., the presence or absence of confusion) or merely excessive background noise and poor measurement.

To avoid this, surveys should take care to avoid grammatical ambiguity, excessive complexity, vague quantifiers, and undefined terms.<sup>62</sup> For example, questions such as “Are you using X product?” can have a variety of meanings (Does “using” mean “using” X product in real-time? Does it mean “using” X product at specific time? Or “using” X product in a specific place?). Each respondent may interpret the question in a slightly different way, adding noise into the data. Similarly, ambiguity can emerge in the response options provided to respondents. Quantifiers such as “very often” or “sometimes” can be problematic in trademark and false advertising surveys because they can mean different things to different people and do not map consistently to any

59. Robert F. Belli, *The Structure of Autobiographical Memory and the Event History Calendar: Potential Improvements in the Quality of Retrospective Reports in Surveys*, 6 *MEMORY* 383–406 (1998).

60. Armin Falk & Florian Zimmermann, *A Taste for Consistency and Survey Response Behavior*, 59 *CESifo ECON. STUD.* 181–93 (2013).

61. Roger Tourangeau, Mick P. Couper, & Frederick Conrad, *Color, Labels, and Interpretive Heuristics for Response Scales*, 71 *PUB. OPINION Q.* 91–112 (2007).

62. TOURANGEAU, RIPS, & RASINSKI, *supra* note 21, at 61.

objective real-world consumer behavior. For example, buying books “often” may mean purchasing two books per month for one respondent but two books per year for another respondent. Finally, unfamiliar terms or technical concepts should be clearly defined. Research suggests that definitions may be ignored if they are not provided directly in the question (e.g., if they are provided as a hyperlink).<sup>63</sup> Thus, it is wise to include the definition in the question stem when possible.<sup>64</sup> Moreover, research shows that providing examples or clear definitions can help respondents correctly interpret vague terms,<sup>65</sup> thereby reducing noise.<sup>66</sup>

### Leading Questions

A leading question is one that implies, either directly or indirectly, that a certain answer is more accurate, proper, or normatively acceptable than other answers.<sup>67</sup> Demonstrating the biasing power of leading questions, a classic study on eyewitness testimony had respondents watch video recordings of a traffic accident. Respondents were later randomly assigned to be asked “About how fast were the cars going when they hit each other?” or the same question with the word “hit” being replaced by either “smashed,” “collided,” “bumped,” or “contacted.”<sup>68</sup> Even though all respondents watched identical videos, respondents in the “smashed” group, for example, estimated significantly higher speeds than respondents in the “hit” group.

Some of the methods described elsewhere in this chapter (e.g., instructing respondents not to guess, avoiding value-laden language, providing “don’t know” responses, avoiding priming effects) can also help in the quest to avoid leading questions. Other principles, however, should also be followed. First, critical questions should generally give equal emphasis to the affirmative, negative, and neutral positions on the subject of inquiry.<sup>69</sup> Sometimes this creates cumbersome questions that are difficult to comprehend. At a minimum, a question should not give more emphasis to the side commissioning the survey or fail to include options that fairly represent the opponent’s position.<sup>70</sup> Second, as discussed under the response format biases section

63. Frederick G. Conrad et al., *Use and Non-use of Clarification Features in Web Surveys*, 22 *J. OFFICIAL STATS.* 245 (2006).

64. Roger Tourangeau, *The Survey Response Process from a Cognitive Viewpoint*, 26 *QUALITY ASSURANCE IN EDUCATION* 169–81 (2018).

65. Roger Tourangeau et al., *Examples in Open-ended Survey Questions*, 29 *INTL. J. PUB. OPINION RES.* 690–702 (2017).

66. Again, however, the decision to provide detailed definitions and information must be considered in the context of replicating marketplace conditions. As a general rule, the objective should be to make respondents as informed as (i.e., neither more nor less informed than) actual consumers in the relevant marketplace.

67. TOURANGEAU, RIPS, & RASINSKI, *supra* note 21.

68. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory*, 13 *J. VERBAL LEARNING & VERBAL BEHAVIOR* 585–89 (1974).

69. Jacob Jacoby, *Are Closed-ended Questions Leading Questions?*, in SHARI SEIDMAN DIAMOND & JERRE B. SWANN (EDS.), *TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE, AND DESIGN* 261–84 (1st ed. 2012).

70. *Id.*

below, the answer options for a question should generally<sup>71</sup> be rotated or randomized across respondents to eliminate the possibility that respondents use order as a cue to the “correct” answer.

### Double-Barreled Questions

Consider the following question: “Do you agree that the flu can be transmitted by shaking hands with a person with the flu or through other means of physical contact?” Both “yes” and “no” responses can have multiple meanings. For example, a “yes” response may mean the respondent believes the flu is transmitted by shaking hands, that the flu is transmitted through other means of physical contact, or both.<sup>72</sup> Thus, the question is double-barreled—that is, it involves two independent but compounded clauses, “shaking hands” and “other means of physical contact.” Aside from being confusing to respondents, such questions can make it impossible to know whether a respondent is affirming or rejecting one or both clauses, or what their response might be to each clause presented independently. To resolve this, double-barreled questions should simply be divided into separate questions, thus allowing the respondent to opine on each clause independently.

### Response Format Biases

Just as a question can create bias, so too can the response options that accompany it. Concerns about response format bias can be addressed through the use of open-ended questions (where no responses are provided), but open-ended data requires human coding that is often qualitative in nature and may be vulnerable to interpretive burden and the challenges of making judgments on complex data.<sup>73</sup> Accordingly, closed-ended questions are heavily relied upon, and care must be taken to ensure the response options used do not create bias. Attesting to the subtle but powerful nature of these effects, one study showed that, when asked which food was “typically German” from a list of foods (potatoes, rice, and noodles), respondents were significantly more likely to choose “potatoes” when it was followed by “rice” compared with when it was preceded by “rice.”<sup>74</sup> Thus, the mere order of response options influenced the answers people gave.

To remedy response format effects, answers should generally be randomized or counterbalanced across respondents.<sup>75</sup> In randomization, response options are truly

random across questions even within a single respondent. In counter-balancing, response options are randomized *across* respondents, but follow a pattern *within* respondents (e.g., affirmative responses to questions always appear first for some respondents and second for others). Both methods remove any impact from respondents who happen to choose options that are higher or lower on a list. Eye-tracking research has shown, for example, that survey respondents generally pay less attention as they move from the first to last response options.<sup>76</sup>

In addition to considering the order of response options, the content and number of response options provided are also important. In a classic study, researchers asked people how many hours they spent watching TV on an average day using one of the two different response formats shown below:<sup>77</sup>

#### 1. Low-frequency scale:

Up to ½ hour  
½ to 1 hour  
1 to 1½ hours  
1½ to 2 hours  
2 to 2½ hours  
More than 2½ hours

#### 2. High-frequency scale:

Up to 2½ hours  
2½ to 3 hours  
3 to 3½ hours  
3½ to 4 hours  
4 to 4½ hours  
More than 4½ hours

Respondents’ answers to the question differed based on the response scale provided to them. That is, they provided lower estimates when given the low-frequency scale and higher estimates when given the high-frequency scale. Fortunately, such effects may primarily be of concern when the behavior in question is sensitive in nature (e.g., excessive TV watching is normatively undesirable) and when the task involves complex recall of past events (see earlier discussion of memory effects).<sup>78</sup> Nonetheless, it is advisable to ensure that response scales provide reasonable coverage of the distribution of possible answers people might plausibly give and do so in a way that is not skewed too high or low.

## CONCLUSION

This chapter provides a roadmap, anchored in psychology and cognitive science, for successfully navigating some of the most common biases and design flaws in trademark and false advertising surveys. We first reviewed biases that stem primarily from the psychological states of survey respondents themselves, including guessing,

71. Response options that are inherently ordered (e.g., age, time, money) are an exception to this rule, as are options that respondents are accustomed to seeing in a specific order (e.g., alphabetical lists of states or countries).

72. Bernard C.K. Choi & Anita W.P. Pak, *Peer Reviewed: A Catalog of Biases in Questionnaires*, 2 PREVENTING CHRONIC DISEASE A13 (2005).

73. Daniel J. Hruschka et al., *Reliability in Coding Open-ended Data: Lessons Learned from HIV Behavioral Research*, 16 FIELD METHODS 307–31 (2004).

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75. Note that there are circumstances in which response options and/or stimuli (e.g., pictures of a product) should not be randomized. For example, if people in the relevant real-world context would likely

see aspects of a product in a specific order, then that order might be replicated in the survey rather than using randomization.

76. Mirta Galesic et al., *Eye-Tracking Data: New Insights on Response Order Effects and Other Cognitive Shortcuts in Survey Responding*, 72 PUB. OPINION Q. 892–913 (2008).

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78. TOURANGEAU, RIPS, & RASINSKI, *supra* note 21.